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ABSTRACT

The individual's right to privacy has evolved into a concept that can affect photojournalists' newsgathering efforts in nearly every state in the nation. In addition to the many states that have recognized the right of privacy through common or statutory laws, the United States Supreme Court has dealt with the issue of an invasion of privacy by the press in four cases. In these cases, the court has attempted to balance public interest with individuals' right to privacy by adopting a malice standard limiting the application of the First Amendment. Generally, the court holds that people's privacy has not been invaded if (1) they are public figures or public participants, (2) they are in a public place or newsworthy situation, (3) photographing methods have not been clandestine or offensive, (4) direct or implied consent to photograph has been given, (5) the photographers have not been found to have acted with malice toward their subjects, (6) a logical connection exists between a newsworthy article and the accompanying photographs, and (7) the photographs have not been published. (MM)

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PHOTOGRAPHIC INVASION OF PRIVACY:

AN OLD CONCEPT WITH NEW MEANING

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PHOTOGRAPHIC INVASION OF PRIVACY:
AN OLD CONCEPT WITH NEW MEANING

Life in America experienced some drastic changes as the twentieth century approached. Industrialization was advancing on a large scale. The nation's growing wealth was being amassed by a small number of individuals and businesses while cities were undergoing massive growth. Advances in communications that were only dreams a few decades before were now becoming commonplace. Daily newspapers, for example, had huge increases in circulation, with the people in cities turning to the dailies "for the story of their urban life and their common interests."[1] The growth of the press paralleled developments in printing and reproduction techniques. In 1880, the first photograph called "Shantytown" was published in the New York Daily Graphic. Within a short time, other newspapers were also running halftone reproductions of photographs.[2]

It was during this rise of the modern press that some publications began prying into the private lives of their readers. Some people spoke out against this development, but no legal remedy could be found.[3] Into this legal vacuum, two young Boston lawyers wrote an article for the Harvard Law Review that became a

cornerstone in a new legal concept, the right of privacy. Samuel D. Warren and Louis D. Brandeis wrote their article in response to the press coverage of the Boston social life in general, and the press coverage of their social life in particular.[4] Arguing for a right of privacy, they said:

> Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the "right to be let alone." Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the housetops."[5]

One example offered by Warren and Brandeis on how a person's privacy could be invaded by photography involved an opera singer, the manager of an opera company, and a picture of the prima donna appearing on stage in her tights. This case, which Warren and Brandeis said was one of the first to involve a photographic invasion of privacy,[6] developed when Marion Manola refused to pose for a picture in her tights. Shortly after the theater manager arranged for a picture to be taken of Manola without her consent, she obtained an injunction prohibiting the use of this photograph.[7]

Although this may have been the first case where there was a question of a photographic invasion of privacy,

the concept of seeking legal redress for a photograph used without consent can be traced to an 1869 article in the American Law Register. Almost as an afterthought, the author suggested that legal action could be taken when a picture was secretly taken and published which depicted a person in a ridiculous situation that could damage his reputation.[8]

It was from legal commentaries that the concept of a legal right of privacy evolved into what one author called an indefinite tort whose principles are difficult to extract from the law.[9] Another author wrote that when privacy "is applied to news, the shadowland grows large."[10] A third legal scholar said, "Privacy is an expanding legal concept that poses new dangers to mass communicators, the principal one being its vagueness or ill-defined limits."[11] The way in which a photograph can become an invasion of privacy is a matter of concern because, as one author noted, the newspaper is more likely to run into privacy limitations through the use of photographs than it would in the use of news stories.[12]

I. The Four Privacy Torts

A news photograph can invade an individual's privacy in one of four ways, commonly referred to as the four privacy torts. This four-part approach to the right of privacy was developed by legal scholar William Prosser.

In a 1960 law review article, Prosser said that a right of privacy is made up of four distinct interests that are tied together by a common name.[13] The four privacy torts outlined by Prosser are:

(1) Intrusion upon an individual's seclusion or solitude, or intrusion into his private affairs.

(2) Public disclosure of embarrassing private facts about an individual.

(3) Publicity which places an individual in a false light in the public eye.

(4) Appropriation of an individual's name or likeness for commercial gain.[14]

The news photographer can invade a person's privacy through any one of the four torts. Under the intrusion tort, for example, the taking of a hospital patient's photograph over the person's objections may be an intrusion upon the individual's privacy.[15] An invasion of privacy under the embarrassing facts tort may occur when a photographer takes and publishes a picture of a deformed child in spite of objections from the child's parents.[16] If a photojournalist takes and uses a photograph of a taxi driver to illustrate an article on dishonest taxi drivers, the photographer can be guilty of a false light invasion of privacy if the taxi driver was honest in his dealings with the public.[17] An invasion of privacy under the appropriation tort may occur when a photograph of an individual is used without consent to advertise a product in a newspaper.[18]

II. Recognition of a Right to Privacy

The right to privacy has been recognized at common law in the following thirty-eight states plus the District of Columbia: Alabama,[19] Alaska,[20] Arizona,[21] Arkansas,[22] California,[23] Colorado,[24] Connecticut,[25] Delaware,[26] the District of Columbia,[27] Florida,[28] Georgia,[29] Hawaii,[30] Idaho,[31] Illinois,[32] Indiana,[33] Iowa,[34] Kansas,[35] Kentucky,[36] Louisiana,[37] Maine,[38] Maryland,[39] Michigan,[40] Mississippi,[41] Missouri,[42] Montana,[43] Nevada,[44] New Hampshire,[45] New Jersey,[46] New Mexico,[47] North Carolina,[48] Ohio,[49] Oregon,[50] Pennsylvania,[51] South Carolina,[52] South Dakota,[53] Tennessee,[54] Texas,[55] Washington,[56] and West Virginia.[57]

In addition to a common law recognition of privacy, several other states have recognized a right of privacy by statute. Nebraska,[58] Rhode Island,[59] and Wisconsin[60] have statutes that protect an individual from an invasion of privacy by any of Prosser's four privacy torts.[61] California,[62] Florida,[63] Massachusetts,[64] New York,[65] Oklahoma,[66] and Virginia[67] have statutes that prohibit an invasion of privacy through the appropriation of an individual's name or likeness for commercial purposes.

Eight states have privacy statutes that directly limit the news photographers ability to gather news. In Delaware,[68] Georgia,[69] Hawaii,[70] Maine,[71] Michigan,[72] New Hampshire,[73] South Dakota,[74] and Utah,[75] it is illegal to either install or use hidden cameras in an area where

a person could reasonably expect to be free from surveillance.

The legal status of a right to privacy is still undecided in several other states. Minnesota has neither recognized nor rejected a right of privacy.[76] There have been no reported privacy cases in North Dakota, Vermont, and Wyoming.

III. Privacy and the Supreme Court

The right of privacy has also been recognized by the United States Supreme Court. In Griswold v. Connecticut[77] the Court said that various guarantees in the Bill of Rights created a constitutional right of privacy. The Court said:

> [T]he First Amendment has a penumbra where privacy is protected from governmental intrusion. . . . The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[78]

A. The Privacy Cases

With the constitutional recognition of a right

of privacy, questions about the relationship between a First Amendment right of a free press and an individual's right of privacy were bound to be raised. The Supreme Court has attempted to balance these conflicting constitutional rights in four cases. They are: Time, Inc. v. Hill,[79] Cantrell v. Forest City Publishing Co.,[80] Cox Broadcasting Corp. v. Cohn,[81] and Zacchini v. Scripps-Howard Broadcasting Co.[82]

1. A question of actual malice

Time, Inc.[83] was the first privacy case decided by the Supreme Court that involved the news media. Although the final decision was issued in 1967, the case resulted from an incident in 1952 when James Hill and his family were held hostage in their home for nineteen hours by three escaped convicts. The Hills were well treated by their captors. Shortly after their release, the Hills moved from their suburban Philadelphia, Pennsylvania, home to Connecticut. They discouraged all efforts by the media to keep them in the public spotlight.[84]

In the following spring, Joseph Hayes wrote a novel, The Desperate Hours, that dealt with a family held hostage by three escaped convicts. Unlike the Hills' experience, the family in the novel was violently treated by their captors. The book was eventually made into a play written by Hayes. The play was performed on Broadway before

being taken to several other locations including Philadelphia.[85]

Life magazine wrote an article on the play and published a series of pictures that were taken in the Hills' former home in Pennsylvania. Actors from the play were photographed in situations that depicted the violence committed by the convicts. Following publication of the article and photographs, James Hill sued for invasion of privacy, claiming that the article gave the impression that the play mirrored the Hill family experience and that Life knew that the portrayal was false. The suit was based upon the New York privacy statute[86] which makes it illegal to appropriate a person's name or likeness for commercial purposes without consent. Life relied on the same statute for its defense, claiming that the publication was a matter of legitimate news interest that was published without malice.[87]

After a series of trials and appeals, the Hills were eventually awarded $30,000 in compensatory damages. When the case reached the Supreme Court, however, the judgment was reversed.[88] The Court held that under the First Amendment guarantee of a free press, Life magazine could be found guilty of an invasion of privacy under the New York statute only if it was proven that the magazine published the article in violation of the New York Times rule of actual malice, that is, "that

the defendant published the report with knowledge of its falsity or in reckless disregard of the truth."[89]

2. A false light invasion of privacy

It was not until seven years later that the Court once again dealt with the question of an invasion of privacy by the mass media. In Cantrell[90] the Court was asked to find a newspaper reporter and publisher guilty of a false light invasion of privacy.

This case resulted from a bridge collapse at Point Pleasant, West Virginia, in 1967. Melvin Cantrell, husband of Margret Cantrell and father of their four children, was killed in a disaster along with forty-three other people. As part of the disaster coverage, a reporter for the Cleveland, Ohio, Plain Dealer wrote a news feature that focused on Marvin Cantrell's funeral and how his death affected his family.[91]

Five months later, the same reporter and a photographer went back to the Cantrell's home for a follow-up feature. Mrs. Cantrell was not home during the visit. The reporter, however, talked to the Cantrell children while the photographer took fifty pictures of the residence and the children. The story and photographs were published in a Sunday feature magazine. The article focused on the family's abject poverty and how the bridge collapse had affected the Cantrell's

in the past five months. Although Mrs. Cantrell was not present during the interview, the reporter's story contained several references to statements that she supposedly made to the reporter.[92]

Following the publication of the story, Mrs. Cantrell filed suit for a false light invasion of privacy. She argued that the story had made the family objects of pity and ridicule in the community, causing them to suffer shame and humiliation. A jury decided in favor of Mrs. Cantrell. This was later overturned by a federal appeals court on the ground that the trial judge did not give the jury proper instructions before their deliberations.[93]

When certiorari was granted, legal scholars expected the Court to use the Gertz negligence rule, established in a 1974 libel judgment concerning a private individual, to privacy cases concerning private individuals. The Gertz negligence rule, which was formulated in Gertz v. Robert Welch, Inc.,[94] allows states to establish for themselves an appropriate standard of liability for publishers and broadcasters in libel cases involving private individuals, as long as the states do not adopt a liability "without fault" standard.

The Court, however, said that the story in question "had portrayed the Cantrells in a false light through knowing or reckless untruth."[95] Therefore, the Court

added:

> [T]his case presents no occasion to consider whether a State may constitutionally apply a more relaxed standard of liability for a publisher or broadcaster of false statements of injurious to a private individual under a false-light theory of invasion of privacy, or whether the constitutional standard announced in Time, Inc. v. Hill applies to all false-light cases.[96]

3. Privacy and public records

The right of the news media to report information obtained from public records, even though that information may be embarrassing to an individual, was the central question faced by the Court in Cox.[97] This case began when a seventeen-year-old girl was raped and murdered in August, 1971. Six youths were indicted for the crime. The victim's identity was not disclosed by the media because of a Georgia statute[98] which made it a misdemeanor to publish or broadcast the name or identity of a rape victim.[99]

During the proceedings, a television reporter learned the victim's name by examining the indictments that were made available for his inspection in the courtroom.[100] No attempt was made by the clerk or anyone else to withhold the victim's name.[101] Later in the day, the reporter broadcast the victim's name in his report.[102]

Shortly after this broadcast, the victim's father brought suit against the newsman and the television

station. Martin Cohn claimed that his privacy had been invaded by the identification of his daughter as the murder victim. The reporter and television station admitted to the broadcast, but claimed that state law plus the First and Fourteenth Amendments gave them a privilege to report the victim's identity.[103] When the Georgia Supreme Court eventually heard the case, it ruled that the First Amendment did not give the press a privilege to report the victim's identity. The United States Supreme Court reversed this decision,[104] holding that "[o]nce true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it."[105]

4. The human cannonball

The fourth invasion of privacy case decided by the Supreme Court involved a rather unusual act; one in which Hugo Zacchini was shot from a simulated cannon into a net some 200 feet away. On August 30, 1972, a freelance reporter went to a county fair in Burton, Ohio. The reporter was carrying a small movie camera. When Zacchini saw the camera, he asked that his performance not be filmed. The reporter temporarily complied with this request, but returned the next day and filmed the entire act. This film was then broadcast that evening on the eleven o'clock news.[106]

Zacchini brought suit against the television station, claiming that his act was appropriated and used for commercial purposes without his consent. The television station was granted summary judgment by the trial court. The case eventually reached the Ohio Supreme Court, following an appeals court decision in favor of Zacchini. The Ohio Supreme Court ruled that the television station could use the film because it depicted a matter of public interest. The United States Supreme Court reversed the Ohio Supreme Court,[107] stating that the "First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent."[108]

B. The First Amendment and the Right of Privacy

Throughout the Supreme Court's opinions in the four privacy cases discussed above, the conflicting interests between the press and an individual's privacy have been analyzed. This analysis was undoubtedly influenced by various arguments presented in the briefs submitted as part of the appeal process. The briefs called for both the granting and denying to the press of a First Amendment privilege to publish information of a private nature.

Those seeking more protection for the individual's right of privacy told the Court that the First Amendment

does not protect acts of trespassing into a private home,[109] publication of embarrassing private facts,[110] publication of fictional material for commercial purposes,[111] or publication of a performer's entire act without consent.[112] In contrast, the Court was also told that the First Amendment protects the publication of information about newsworthy events,[113] public performers,[114] and information that made a logical connection between an individual and the event depicted.[115]

1. The absolutist approach

In confronting the different interests advanced by the press and those seeking a right of privacy, the Court has never adopted the view that the First Amendment gives the media an absolute immunity from privacy suits. Justices Douglas and Black, however, have taken such a view in their concurring and dissenting opinions.

Justice Black first raised the idea of an absolute First Amendment protection against privacy suits in his concurring opinion in Time, Inc. He argued that the founding fathers established a free press. Therefore, Justice Black said, judges should not be allowed to weigh competing interests between a free press and an individual's privacy.[116] Justice Douglas, in his concurring opinion in Time, Inc., reenforced this concept by stating that the use of a "'knowing and reckless

falsity' [standard] is . . . an abridgement of speech that is barred by the First and Fourteenth Amendments."[117]

Justice Douglas repeated his absolutist views in Cantrell[118] and Cox.[119] Justice Douglas' dissent in Cantrell repeated his view that allowing a judge to qualify First Amendment freedoms through the use of a fault standard "is to stand the [First] Amendment on its head."[120] In Cox, Justice Douglas wrote his concurring opinion to emphasize that the First Amendment, which applies to the states through the Fourteenth Amendment, prohibits states from punishing the media for merely discussing public affairs.[121]

2. Limiting the First Amendment protection

Rather than granting an absolute First Amendment protection against invasion of privacy suits as advocated by Justices Douglas and Black, the Court has taken a more cautious balancing approach. The Court has outlined in general terms the limitations that a right of privacy can place on the First Amendment right to publish information. In Time, Inc. the Court held that there must be a showing of knowledge of the falsity of information or a reckless disregard for the truth in order to overcome the First Amendment protection to publish false reports on matters of public interest.[122] Further support for this limitation on the First Amendment

freedom came from Justice Harlan's statement that "[t]he power of a State to control and remedy such intrusion [into an individual's privacy] for newsgathering purposes cannot be denied . . . ."[123] Justice Fortas echoed this belief in his dissent with the statement, "I do not believe that the First Amendment precludes effective protection of the right of privacy . . . ."[124]

The Court has strengthened the concept that the right of privacy can place limits on the First Amendment freedom to publish information. The First Amendment provides the news media with only a limited protection against invasion of privacy suits when the media have either falsified information that has placed someone in a false light before the public,[125] or have broadcast a performer's entire act without his consent.[126]

IV. A Matter of Public Interest

In any discussion of a photographic invasion of privacy, the concept of a public interest is bound to be raised. The courts have often based their decisions on what they considered to be a matter of public interest or newsworthiness. In other words, when a photograph depicts something of a public interest, then it is less likely that an invasion of privacy suit will be successful.[127]

A. Identifying the Public Interest

Trying to identify what falls within the public's interest is not an easy matter, as one court noted:

> While it may be difficult in some instances to find the point at which public interest ends, it seems reasonably clear that pictures of a group of corpulent women attempting to reduce with the aid of some rather novel and unique apparatus do not cross the borderline, at least so long as a large proportion of the female sex continues its present concern about any increase in poundage.[128]

Just who should determine what information falls within the public's interest is a matter of some debate. Both the courts[129] and the press[130] have been identified as being in the best position to determine which photographs are in the public interest.

There is a general agreement, however, on the type of material that can be of interest to the public. Several courts have said that photography that is concerned primarily with entertainment as opposed to news still falls within the public interest and thus deserves First Amendment protection given to the more traditional forms of news photography.[131] One court has taken a narrower approach, stating that the term public interest should not be confused with public curiosity.[132] Another court has observed that there is no public "right to know," just a "right to find out."[133]

B. People in the Public Interest

A key element in news photography is people. From the beginning, the news photographer is told that people make news. Because of this emphasis on people, the photojournalist's newsgathering efforts have often run into conflict with an individual's desire to be left alone. The reported cases that have attempted to draw a line between the photojournalist's right to gather information and the individual's right of privacy have approached the question of people in the news from three general perspectives. The are: the public person, the public participant, and the private person in an embarrassing moment.

1. The public person

Determining just who is a public person is never an easy task, especially when a question of photographic invasion of privacy is involved. The public person designation is important, however, because that individual generally has a much more limited right of privacy.

The courts have often looked to the fact that an individual was either employed or otherwise supported by the government as a means of identifying public persons. For example, the courts have stated that policemen,[134] postmen,[135] and prisoners[136] could not claim an invasion of privacy through photography because they were public figures.

2. The public participant

A second factor that may limit a right of privacy focuses on the actions by an individual. If a person draws attention to himself through his own behavior, then he usually sacrifices some of his right of privacy. Supreme Court Justice Powell stressed this concept in his dissent in Zacchini. He wrote that a public performer, "having chosen, in essence, to make it [his act] newsworthy . . . cannot, consistent with the First Amendment, complain of routine news reportage."[137]

Removing a right of privacy because of the person's own actions has produced a rather interesting collection of reported cases dealing with a photographic invasion of privacy. For example, the courts have said that photographs of a drunken football fan dancing in front of a crowd with his fly open,[138] a man who wore an "Irish" hat, a green bow tie and a green pin,[139] a boy eating an ice cream cone given to him because he was the 10,000th visitor at an ice cream store,[140] and a convict on parole who was murdered in the streets of an Alabama town[141] were not invasions of privacy because the people involved had in some way drawn attention to themselves.

3. The embarrassing moment

There are times when a private individual may be caught in an embarrassing moment that he may not wish

to share with the public via news photography. It is in the publication of embarrassing information, the Supreme Court said, that "claims of privacy most directly confront the constitutional freedoms of speech and press."[142]

Photographs that would be an invasion of privacy through the publication of embarrassing facts would have to contain material that is highly offensive to a reasonable person and is not a matter of legitimate public concern.[143] By using this general guideline, the courts have said that photographs of a person being arrested, even though he was not guilty of any crime,[144] and an elderly man sorting mail[145] were not invasions of privacy under the embarrassing facts tort. However, the Alabama Supreme Court once ruled that a photograph of a woman with her dress blown up above her waist was "embarrassing to one of normal sensibilities . . . ."[146]

C. Events in the Public Interest

In addition to looking at the people involved in a photographic invasion of privacy, the courts have also considered the events that brought the news photographer and the person together. Both the location and the nature of the event have often been examined in an effort to determine if a public interest was involved.

1. Privacy in a public place

The photojournalist's desire to take pictures in public places faces few restrictions. This is because people who enter the public view generally relinquish their right to claim an invasion of their privacy through news photography. Photographs or film of people standing,[147] walking,[148] kissing,[149] dancing,[150] and performing[151] in public have not violated an individual's right of privacy. Photographs which were taken from a public place of an individual's home[152] or his business[153] did not violate the property owner's privacy.

An individual's right of privacy during a trial was raised in a key courtroom photography case decided by the Florida Supreme Court. The court said that a defendant's privacy was not violated by allowing cameras in the courtroom.[154] This decision was in direct contrast to an opinion issued by the Florida Supreme Court several years earlier.[155]

2. Privacy and the public event

The photojournalist also faces few privacy restrictions when an individual is involved in a newsworthy event. The key problem in this area is in knowing what is newsworthy. A federal district court in California offered a three-part definition of this elusive term. The court said that newsworthiness should be judged according

to: "(1) the social value of the facts published; (2) the depth of the article's intrusion into ostensibly private affairs; and (3) the extent to which the party involved voluntarily acceded to a position of public notoriety."[156]

Rather than trying to provide broad definitions of newsworthiness, the courts have often looked to the events in question. By using this method, photographs depicting murder,[157] suicide,[158] robbery,[159] a hostage situation,[160] a bomb threat,[161] traffic accidents,[162] and an accidential suffocation[163] have all been judged as newsworthy and therefore not invasions of privacy.

V. Newsgathering techniques as an invasion of privacy

Although the courts have taken a broad view of what is in the public interest, this does not mean that the photojournalist has an absolute right to gather the news. A key factor limiting the photojournalist's right to take pictures is the method used to obtain his pictures. Such actions as the use of hidden cameras, offensive behavior, trespass, violation of consent, alteration of photographs, and the question of malice have all been considered when the courts have dealt with an alleged invasion of privacy.

A. Crimes Committed in Photographic Newsgathering

The fact that the First Amendment does not give news photographers a right to commit crimes while gathering news plays a key role in this area. The courts have not hesitated to find a photographer guilty of an invasion of privacy if a crime or tortious act was committed by the photojournalist.[164]

1. The use of hidden cameras

In an attempt to capture his subject off guard, the news photographer may be tempted to use a hidden camera. Whether this action will be within the bounds of the law depends on several considerations. For one, this activity is illegal in eight states.[165] For another, the status of the person photographed may determine if an invasion of privacy would occur.

There are two reported cases that involve the use of hidden cameras. In one case, the Federal Court of Appeals, Ninth Circuit, said that one should not have to risk having his picture taken by a hidden camera merely because a reporter was invited into his home.[166]

An Illinois appellate court reached a somewhat different conclusion on the use of hidden cameras. The Court held that a policeman who had been filmed by a hidden camera in a massage parlor could not recover for an intrusion into his privacy because he was a public

official who was working in an official capacity as an undercover investigator.[167]

2. Offensive behavior as an invasion of privacy

The news photographer's behavior can also lead to an invasion of privacy conviction. In 1973, the Federal Court of Appeals, Second Circuit, said that photographer Ron Galella had gone too far in photographing Jacqueline Onassis. The court said that Galella had "often jumped and postured around while taking pictures of her . . . ."[168] Galella also "followed a practice of bribing apartment house, restaurant and nightclub doormen as well as romancing a family servant to keep him advised of the movements of the [Onassis] family."[169] Having made these observations, the court affirmed, with modification, a lower court ruling that had established a zone around Onassis and her family that Galella could not violate.[170]

This court order, however, did not stop Galella from taking pictures of Onassis. A federal district court in New York recently said that Galella had continued to violate the restrictions placed upon him by a federal appeals court. The district court said that "Galella's brazen behavior . . . was fully intended by him to convince Mrs. Onassis and Ms. Kennedy that even court orders could not protect them from his onslaughts."[171] In short, "Gallella has clearly challenged

the Court."[172] Because of this challenge, the photographer was found guilty of contempt of court on twelve counts.[173]

3. A question of consent

The photojournalist can find himself faced with an invasion of privacy suit if he does not obtain consent before taking pictures. The question of consent is crucial when the news photographer is covering a breaking story. The Florida Supreme Court recently held that a photojournalist who entered a private home that had been damanged by fire was not guilty of an invasion of privacy. The court based its decision on the fact that it was a common custom for news photographers to enter private property where a disaster of great public interest had occurred. This custom, coupled with the fact that fire officials invited the photojournalist into the home, led to the court's conclusion that entry was by implied consent.[174]

The question of consent has also been considered in other reported cases involving a photographic invasion of privacy. The Federal Court of Appeals, Fifth Circuit, said that the failure of a woman to object to a photographer's presence in her home could be considered as consent. Therefore, her privacy was not invaded.[175] Other courts have pointed to the photographer's picture

taking efforts over the objections of those photographed in hospitals[176] and mental institutions[177] as partial justification for finding a photographer guilty of invasion of privacy.

4. The alteration of photographs

One method a news photographer can use to avoid an invasion of privacy is to alter the final image. A federal appeals court said that because a published photograph was altered to the extent that it was impossible to identify the home in the picture, there was no invasion of privacy.[178]

Posing or staging photographs has also helped avoid invasions of privacy. The Supreme Court in Time, Inc. noted that although photographs were staged with professional actors,[179] there was no invasion of privacy because there had been no showing of malice in the publication of the article and photographs.[180] A court in New York reached a similar conclusion several years earlier when it said that using professional actors to pose for a picture did not constitute an invasion of privacy under the New York privacy statute.[181]

B. A Matter of Malice

The matter of malice in an invasion of privacy suit provides both protection and problems for the photojournalist. The Supreme Court in Time, Inc., held that a showing of knowledge of falsity or reckless disregard

of the truth was necessary before the press could be found guilty of a false light invasion of privacy.[182] The Court in Cantrell said that punitive damages for false light invasion of privacy could be recovered by using the lesser standard of common law malice, rather than relying on the New York Times definition of actual malice. "In a false-light case," the Court said, "common-law malice--frequently expressed in terms of either personal ill will toward the plaintiff or reckless or wanton disregard of the plaintiff's rights--would focus on the defendant's attitude toward the plaintiff's privacy, not toward the truth or falsity of the material published."[183]

Many courts have used the question of malice in reaching a decision regarding a photographic invasion of privacy.[184] The use of a malice test can provide the photographer with some protection in that it is usually more difficult to win in an invasion of privacy suit. To require a lesser fault standard like a negligence test would, as the Supreme Court said, "place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it [the press] to verify the accuracy of every reference to a name, picture or portrait."[185]

The problem with the malice standard for the news photographer lies in the use of discovery proceedings.

Discovery proceedings are pretrial methods used by one party to obtain information from another party. This often refers to a disclosure of facts, documents, or other materials that one party alone has knowledge of and which is needed by the other party to establish a cause of action.[186]

The Federal Rules of Civil Procedure outlines the scope of the discovery process to include material that is relevant to a pending court action. This does not include privileged material. The information sought may relate to either party's claim or defense and does not exclude discovery of material that may be inadmissable in court but which could lead to a discovery of admissable evidence.[187] Most states have similar rules governing discovery in civil proceedings.[188]

The Supreme Court for the first time dealt with the scope of the discovery process in a libel case in Herbert v. Lando.[189] The Court held that a public figure who was trying to prove knowing or reckless falsehood in order to collect damages in a libel suit could use the discovery process to inquire into the media's conduct and state of mind when the publication was prepared.[190]

The discovery process was recently used in photographic invasion of privacy case. When punitive damages were sought for an invasion of privacy, a Florida

court of appeals upheld a trial court order which required a news photographer and several news organizations to turn over all negatives and prints taken of a hostage situation.[191]

This case began when a woman was held hostage by her estranged husband. During her captivity, she was beaten and forced to disrobe. After her husband committed suicide, she was led to safety in a state of shock. She was nude at the time, clutching only a small towel to her waist. A photographer took her picture which was later published in several newspapers across the country. The woman claimed that her privacy was invaded by "a deliberate, malicious and concerted act" which was "calculated to cause severe emotional distress and mental pain and anguish . . . ."[192] In addition to her request for negatives and prints, the photojournalist was required to answer twenty-two questions about the incident. Several news organizations were also required to produce "all notes, memorandum, rough draft[s], stories and all other materials" that related to the incident.[193]

Although the discovery process can be used to establish a photographic invasion of privacy, it is not a mandatory method of proving the photojournalist's guilt. A federal district court recently noted that a film which implied that a hunter had shot a goose on the ground was sufficient evidence to find a television

network guilty of a false light invasion of privacy.[194] The court said that the implication was "a nasty thing to say about a hunter, even if you smile when saying it."[195]

The court also noted that the discovery process did not have to be used in every invasion of privacy case. The court said the argument that discovery proceedings are necessary in all privacy cases implied that:

> [A] poor man or even a man of some means has no business bringing litigation in court unless he can afford the services of a large double-breasted law firm with platoons of young credit card-carrying associates who can fan out all over the country on a search-and-depose mission . . . . To suggest that they [those whose privacy was invaded] cannot have their day in court without the orgy of discovery that now attends most lawsuits in Federal Court between well-heeled corporate litigants is indeed a bleak prospect for American justice.[196]

VI. Publication as an Invasion of Privacy

The limitations that an individual's right of privacy can place on photographic newsgathering are often not realized until after the images are published. Once in the public view, photographs or film may stimulate an invasion of privacy action which could inhibit the news photographer's future efforts.

An after-the-fact judgment concerning a photographic invasion of privacy poses difficult problems.

The courts must balance the interests of the news photographer against those of the person photographed. Several courts have acknowedged a need for balancing when confronted with this issue.[197]

A. Words and Pictures

One method used by the courts in balancing the competing interests is to look at the relationship between the photograph and the accompanying article. The courts have usually denied an invasion of privacy claim if there is a logical connection between the photograph or film and an article or broadcast about a matter of public interest,[198] even though the photograph was published among other "lurid or indecent articles or photographs . . . ."[199] The courts have also been reluctant to find an invasion of privacy when photographs were republished years later, as long as there was a relationship between the new article which dealt with a matter of public interest and the old images.[200] If there was no relationship between the old photograph and the new article, then the courts have said that there was an invasion of privacy.[201]

B. Privacy Among Different Media

The courts have not used the differences between media such as magazines, television, and film, in balancing the interests between the press and the individual.

Several courts, for example, have stated that any question of a right to privacy in regards to news photography should apply with equal consistency to television newscasts,[202] magazines,[203] newsreels,[204] and material produced by freelance photographers.[205]

C. Privacy and the Commercial Connection

The idea that a news photograph uses a person's likeness for commercial purposes, and is thus an invasion of privacy, has been raised on several occasions. The courts have adopted the general principle that the use of a news photograph or film as part of the communication of a matter of public interest does not represent an invasion of privacy through appropriation.[206]

When the question of an appropriation of an individual's likeness is raised in connection with news photography, a state statute is usually involved.[207] If the photograph in question depicts a matter of public interest, there is rarely an invasion of privacy. In New York, for example, several courts have held that a photograph of a public person or a public event is not an invasion of privacy under the state privacy statute.[208] A Massachusetts privacy statute,[209] similar to the New York statute,[210] also does not apply to the use of news photography depicting matters of public interest.[211]

VII. Summary and Conclusions

The individual's right of privacy, an idea that developed nearly one hundred years ago, has evolved into a concept that can affect the photojournalist's newsgathering efforts in nearly every state in the nation. Thirty-eight states plus the District of Columbia have recognized a common law right of privacy.[212] In addition to this, several other states have recognized a right of privacy through statutory law.[213] Of special interest to the phocojournalist are the statutes that forbid the use of hidden cameras in places where the subject would normally expect to be free from surveillance.[214]

The United States Supreme Court has dealt with the issue of an invasion of privacy by the press in four cases.[215] The Court said that unless the media had acted with malice in publishing information placing a person in a false light, no invasion of privacy claim can be sustained. The Court has also said that privacy interests fade when information appears on public records. The Court has also limited the ability of the press to photograph a performer's act by stating that the entire performance cannot be shown on a television newscast without consent.

In considering the four privacy cases, the Supreme Court has rejected an absolute First Amendment immunity

from privacy suits, in spite of arguments put forth by Justices Douglas and Black.[216] In place of an absolute First Amendment immunity, the Court adopted a malice standard for limiting the First Amendment right to publish information.[217]

The concept of a public interest has often been used by the courts in balancing the interest of the press and the individual. The problem with using a public interest approach is in defining public interest.[218] Rather than trying to provide one basic definition of what the public interest is, the courts have looked to two general concepts to determine if an individual's privacy has been invaded by news photography. The first focuses on the individual's position in society at the time that the photograph was taken. If a person is a public figure,[219] or a public participant,[220] the news photographer will not be violating the individual's privacy in most instances by taking his photograph. If, however, a person is caught in an embarrassing private moment which may be offensive to an ordinary person and is of no concern to the public, then the news photographer's right to take the individual's picture is more limited.[221]

The situation in which the individual is caught at the time the photograph is taken is the second general concept used by the courts in balancing of interests.

In the balancing process, the courts have looked at the relationship between an article and the accompanying photographs. If there is a logical connection between the two, and if both concern a matter of public interest, then there is usually no invasion of privacy, even when the photographs were taken several years earlier. However, if there is no connection between the two, then it is more likely that the photograph will be judged as an invasion of privacy. The courts have also said that different media such as television, film, and magazines should be treated equally when considering a privacy question.[232]

Many of the photographic invasion of privacy cases have involved privacy statutes that forbid the appropriation of a person's name or likeness for commercial purposes. The courts have said that if a news photograph is used for non-commercial purposes such as in the presentation of information on matters of public interest, then there is no invasion of privacy.[233]

It appears that the news photographer has a wide latitude in gathering and publishing information that may infringe on an individual's privacy. Photographs taken without malice in public places depicting people in situations of public interest find little privacy restrictions placed on their dissemination. Through the exercise of good taste by avoiding images that may

be offensive to others, the photojournalist is generally free to photograph a wide variety of subjects and situations.

If and when an invasion of privacy claim is raised, it is often after the photographs are published. Thus, the limits that privacy can place on a photojournalist's newsgathering efforts may do so by affecting future behavior. It is a rare occasion when the taking of a photograph alone is seen as an invasion of privacy.

This of course does not mean that the news photographer has a legal carte blanche to photograph at will. There are some limits on his newsgathering efforts through the use of a malice test, discovery proceedings, plus the consideration of hidden cameras and offensive behavior as invasions of privacy. But beyond these few limitations, the concept of an individual's right of privacy is not a great barrier for the photographer interested in gathering the news. This is true even though there is no absolute First Amendment right to gather photographic information of an individual's private moments.

If a person is in a public place[222] or in a newsworthy situation[223] the photojournalist usually will not be involved in an invasion of privacy. Rather than outlining in general terms what constitutes a newsworthy event, the courts have looked to the specific situation captured in the photographs. Pictures of everything from murders to traffic accidents have been judged as newsworthy and thus not an invasion of privacy.

The methods used by the news photographer can result in an invasion of privacy. The courts[224] and several state legislatures[225] have generally taken a negative view on the use of hidden cameras. Several legal scholars have also expressed concern about the use of hidden cameras as a means to gather information.[226] Offensive behavior by a photographer can also lead to an invasion of privacy suit, even when the individual photographed is a public figure.[227]

Consent has been used as a defense in several photographic invasion of privacy cases. The courts have held that consent to take photographs was implied when fire officials asked a news photographer to accompany them into a private home, and when a person failed to object to the presence of photographers in her home. The alteration of news photography and the use of actors to recreate scenes of public interest have also been used in place of consent to avoid invading an

individual's privacy.[228]

The photojournalist's feelings toward his subject may also play a key role in determining if a person's privacy has been invaded. Many courts, including the Supreme Court, have said that a photographer must have acted with malice toward his subject before an invasion of privacy suit can succeed.[229]

Although the use of a malice standard may make it more difficult to win in a privacy action against the press, it also creates a new problem with the use of a discovery proceeding to establish malice. Discovery proceedings have only recently been used in photographic invasion of privacy cases. However, there is a potential for this pretrial procedure to delve deeply into the photojournalist's newsgathering methods just as the discovery process has affected recent libel litigation.[230]

The actual publication of news photography, more than the methods used to gather the images, precipitates most invasion of privacy actions. When confronted with the competing interests of a free press and an individual's right of privacy, the courts have used a balancing of interests approach in reaching their decisions. Several legal scholars have also advocated the use of a balancing test when deciding photographic invasion of privacy cases.[231]

[38]Estate of Berthiaume v. Pratt, 365 A.2d 192 (Me. 1976).

[39]Carr v. Watkins, 177 A.2d 841 (Md. App. 1962).

[40]Pallas v. Crowley, Milner & Co., 33 N.W.2d 911 (Mich. 1948).

[41]Martin v. Dorton, 50 So. 2d 391 (Miss. 1951).

[42]Munden v. Harris, 134 S.W. 1076 (Mo. Ct. App. 1911).

[43]Welsh v. Pritchard, 241 P.2d 816 (Mont. 1952).

[44]Norman v. City of Las Vegas, 177 P.2d 442 (Nev. 1947).

[45]Hamberger v. Eastman, 206 A.2d 239 (N.H. 1964).

[46]Vanderbilt v. Mitchell, 67 A. 97 (N.J. 1907).

[47]Hubbard v. Journal Publishing Co., 368 P.2d 147 (N.M. 1962).

[48]Flake v. Greensboro News Co., 195 S.E. 55 (N.C. 1938).

[49]Housh v. Peth, 133 N.E.2d 340 (Ohio 1956).

[50]Hinish v. Meier & Frank Co., 113 P.2d 438 (Ore. 1941).

[51]Harlow v. Buno Co., 36 Pa. D. & C. 101 (C.P. 1939).

[52]Holloman v. Life Insurance Co. of Virginia, 7 S.E.2d 169 (S.C. 1940).

[53]Truxes v. Kenco Enterprises, 119 N.W.2d 914 (S.D. 1963).

[54]Langford v. Vanderbilt Univ., 287 S.W.2d 32 (Tenn. 1956).

[55]Billings v. Atkinson, 489 S.W.2d 858 (Tex. 1973).

[56]Mark v. KING Broadcasting Co., 618 P.2d 512 (Wash. Ct. App. 1980).

[57]Roach v. Harper, 105 S.E.2d 564 (W. Va. 1958).

[58]NEB. REV. STAT. §§ 20-201 to 20-211 (Supp. 1979).

[59]R.I. GEN. LAWS §§ 9-1-28 to 9-1-28.1 (Supp. 1981).

[60]WIS. STAT. ANN. § 895.50 (West Supp. 1981-1982).

[61]See supra text accompanying notes 13-14.

[62]CAL. CIV. CODE § 3344 (West Supp. 1982).

[63]FLA. STAT. ANN. § 540.08 (West 1972).

[64]MASS. GEN. LAWS ANN. ch. 214, § 3A (West Supp. 1981).

[65]N.Y. CIV. RIGHTS LAW §§ 50 to 51 (McKinney 1976).

[66]OKLA. STAT. ANN. tit. 21, §839.1 (West Supp. 1981-1982).

[67]VA. CODE § 8.01-41 (1977).

[68]DEL. CODE ANN. tit. 11, § 1335 (1979).

[69]GA. CODE § 26-3001 (1977).

[70]HAWAII REV. STAT. § 711-1111 (1976).

[71]ME. REV. STAT. ANN. tit. 17-A, § 511 (Supp. 1981).

[72]MICH. COMP. LAWS ANN. § 750.539d (1968).

[73]N.H. REV. STAT. ANN. § 644:9 (1974).

[74]S.D. CODIFIED LAWS ANN. § 22-21-1 (1979).

[75]UTAH CODE ANN. § 76-9-402 (1978).

[76]Wilson v. Colonial Penn Life Insurance Co., 454 F. Supp. 1208 (D. Minn. 1978).

[77]381 U.S. 479 (1965).

[78]Id. at 483-84.

[79]385 U.S. 374 (1967).

Notes

[1]E. Emery & M. Emery, THE PRESS AND AMERICA 201 (4th ed. 1978).

[2]Id. at 235.

[3]W. Swindler, PROBLEMS OF LAW IN JOURNALISM 245 (1973).

[4]D. Pember, PRIVACY AND THE PRESS 229 (1972).

[5]Warren & Brandeis, The Right to Privacy, 4 HARV. L. REV. 193, 195 (1890).

[6]Id. at 195 n. 7.

[7]This case was not reported, but an account of it appears in N.Y. Times, June 15, 1890, at 2, col. 3.; N.Y. Times, June 18, 1890, at 3, col. 2; N.Y. Times, June 21, 1890, at 2, col. 2.

[8]The Legal Relations of Photographs, 8 AM. L. REG. N.S. 1, 8 (1869).

[9]D. Pember, supra note 4, at 228.

[10]W. Steigleman, THE NEWSPAPERMAN AND THE LAW 226 (1971).

[11]W. Francois, MASS MEDIA LAW AND REGULATION 143 (2d ed. 1978).

[12]W. Steigleman, supra note 10, at 222-23.

[13]Prosser, Privacy, 48 CALIF. L. REV. 383, 389 (1960).

[14]Id.

[15]RESTATEMENT (SECOND) OF TORTS § 652B comment b, illustration 1 (1981).

[16]Id. at § 652D comment b, illustration 7.

[17]Id. at § 652E comment b, illustration 2.

[18]Id. at § 652C comment b, illustration 1.

[19]Smith v. Doss, 37 So. 2d 118 (Ala. 1948).

[20]Smith v. Surratt, 7 Alaska Rpts. 416 (D. Alaska 1926).

[21]Reed v. Real Detective Publishing Co., 162 P.2d 133 (Ariz. 1945).

[22]Olan Mills, Inc. of Texas v. Dodd, 353 S.W.2d 22 (Ark. 1962).

[23]Melvin v. Reid, 297 P. 91 (Cal. App. 1931).

[24]Rugg v. McCarty, 476 P.2d 753 (Colo. 1970).

[25]Korn v. Rennison, 156 A.2d 476 (Conn. Super. Ct. 1959).

[26]Barbieri v. News-Journal Publishing Co., 189 A.2d 773 (Del. 1963).

[27]Peay v. Curtis Publishing Co., 78 F. Supp. 305 (D.D.C. 1948).

[28]Cason v. Baskin, 20 So. 2d 243 (Fla. 1945).

[29]Pavesich v. New England Life Insurance Co., 50 S.E. 68 (Ga. 1905).

[30]Fergerstrom v. Hawaiian Ocean View Estates, 441 P.2d 141 (Hawaii 1968).

[31]Peterson v. Idaho First Nat'l Bank, 367 P.2d 284 (Idaho 1961).

[32]Eick v. Perk Dog Food Co., 106 N.E.2d 742 (Ill. App. 1952).

[33]Continental Optical Co. v. Reed, 86 N.E.2d 306 (Ind. App. 1949).

[34]Bremmer v. Journal-Tribune Publishing Co., 76 N.W.2d 762 (Iowa 1956).

[35]Kunz v. Allen, 172 P. 532 (Kan. 1918).

[36]Foster-Milburn Co. v. Chinn, 120 S.W. 364 (Ky. 1909).

[37]Itzkovitch v. Whitaker, 39 So. 499 (La. 1905).

[113]Brief for Respondents at 12-14, Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974); Brief for the Apellants Cox Broadcasting Corporation and Thomas Wassell at 54-55, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

[114]Brief for Respondent at 23, Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

[115]Brief for the Appellant at 39-41, Time, Inc. v. Hill, 385 U.S. 374 (1967).

[116]385 U.S. at 399 (Black, J., concurring).

[117]Id. at 402 (Douglas, J., concurring).

[118]419 U.S. at 254-55 (Douglas, J., dissenting).

[119]420 U.S. at 500-01 (Douglas, J., concurring).

[120]419 U.S. at 255 (Douglas, J., concurring).

[121]420 U.S. at 500 n. * (Douglas, J., concurring).

[122]385 U.S. at 387-88.

[123]Id. at 404 (Harlan, J., concurring in part, dissenting in part).

[124]Id. at 412 (Fortas, J., dissenting).

[125]Cantrell v. Forest City Publishing Co., 419 U.S. at 252-53.

[126]Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. at 574-75.

[127]The concept of newsworthiness has often been used by the media as a defense in privacy suits. For a detailed discussion of newsworthiness as a defense in invasion of privacy cases, see S. Good, Newsworthiness as a Privacy Defense for the Media (June 1981) (unpublished Ph.D. dissertation available at Southern Illinois University, Carbondale, Illinois 62901).

[128]Sweenek v. Pathe News, 16 F. Supp. 746, 747-48 (E.D. N.Y. 1936).

[129]Buzinski v. DoAll Co., 175 N.E.2d 577, 580 (Ill. App. Ct. 1961); Barber v. Time, Inc., 159 S.W.2d 291, 295 (Mo. 1942). But cf. Neff v. Time, Inc., 406 F. Supp. 858, 860 (W.D. Pa. 1976) (stating that the courts should not be concerned with establishing standards of good taste for the press and the public).

[130]See, e.g., Goldman v. Time, Inc., 336 F. Supp. 133, 138 (N.D. Cal. 1971).

[131]Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. at 578; Jenkins v. Dell Publishing Co., 251 F.2d 447, 451 (3d Cir. 1958), cert. denied, 357 U.S. 921 (1958); Goldman v. Time, Inc., 336 F. Supp. at 138; Gill v. Hearst Publishing Co., 253 P.2d 441, 444 (Cal. 1953); Buzinski v. DoAll Co., 175 N.E.2d at 579; Sarat Lahiri v. Daily Mirror, Inc., 295 N.Y.S. 382, 389 (N.Y. Sup. Ct. 1937).

[132]Metter v. Los Angeles Examiner, 95 P.2d 491, 494 (Cal. Ct. App. 1939).

[133]Rafferty v. Hartford Courant, 416 A.2d 1215, 1216 (Conn. Super. Ct. 1980).

[134]Ross v. Burns, 612 F.2d 271, 274 (6th Cir. 1980); Faucheux v. Magazine Management, 5 Media L. Rep. 1697, 1700 (E.D. La. 1979); Cassidy v. American Broadcasting Companies, Inc., 377 N.E.2d 126, 131-32 (Ill. App. Ct. 1978); Martin v. Dorton, 50 So. 2d 391, 394 (Miss. 1951): Hull v. Curtis Publishing Co., 125 A.2d 644, 650-51 (Pa. Super. Ct. 1956).

[135]Truxes v. Kenco Enterprises, Inc., 119 N.W.2d 914, 919 (S.D. 1963).

[136]Buckley v. W.E.N.H., 5 Media L. Rep. 1509, 1510 (D. N.H. 1979); Travers v. Paton, 261 F. Supp. 110, 117 (D. Conn. 1966).

[137]433 U.S. 582 (Powell, J., dissenting). See also Goelet v. Confidential, Inc., 171 N.Y.S.2d 223, 225 (N.Y. App. Div. 1958) (stating that the New York privacy statute does not apply to "those who through their own activities have become public figures.").

[138]Neff. v. Time, Inc., 406 F. Supp. at 859.

[139]Murray v. New York Magazine Co., 318 N.Y.S.2d 474, 475-76 (N.Y. 1971).

[80]419 U.S. 245 (1974).

[81]420 U.S. 469 (1975).

[82]433 U.S. 562 (1977).

[83]385 U.S. 374.

[84]Id. at 378.

[85]Id. The book was also made into a Hollywood film that starred Frederick March as the father and Humphrey Bogart as the convict leader.

[86]N.Y. CIV. RIGHTS LAW §§ 50 to 51 (McKinney 1976).

[87]Id. at 376-79.

[88]Id. at 379-80.

[89]Id. at 387-88. The New York Times rule of actual malice was adopted by the Court in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). In this case, the Court said that a public official could not recover damages for a defamatory falsehood relating to his official conduct unless he could prove that the publication was made with actual malice. The Court defined actual malice as a statement made "with knowledge that it was false or with reckless disregard of whether it was false or not."

[90]419 U.S. 245.

[91]Id. at 247.

[92]Id. at 247-48.

[93]Id. at 248-49.

[94]418 U.S. 323 (1974).

[95]419 U.S. at 253.

[96]Id. at 250-51. The story eventually cost the newspaper $60,000 in damages. The false light invasion of privacy action against the photographer was dropped because "the photographs he took were fair and accurate depictions of the people and the scenes he found at the Cantrell residence." Id. at 253 n. 5.

[97]420 U.S. 469.

[98]GA. CODE ANN. § 26-9901 (1972).

[99]420 U.S. at 471-72.

[100]Id. at 472.

[101]Id. at 472 n. 3.

[102]Id. at 473-74.

[103]Id. at 474.

[104]Id. at 474-76.

[105]Id. at 496.

[106]Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. at 563-64.

[107]Id. at 564-66.

[108]Id. at 575. Part of the Court's rationale in this case was based on the fact that the state of Ohio had a statute that provided for a "right of publicity." The Court said Zacchini was seeking to be paid for a film that posed "a substantial threat to the economic value of that performance." Id. at 575. Therefore, the Court said, the unauthorized broadcast of Zacchini's performance "goes right to the heart of petitioner's ability to earn a living as an entertainer." Id. at 576. If the state of Ohio wished to give the media a special privilege to broadcast a performer's entire act without consent, the Court said that the state could do so. But, the Court concluded, the First and Fourteenth Amendments do not require the state to grant such a privilege to the news media. Id. at 578-79.

[109]Brief for Petitioners at 54, Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974).

[110]Appellee's Brief at 10-13, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

[111]Brief for Appellee at 39-42, Time, Inc. v. Hill, 385 U.S. 374 (1967).

[112]Brief for Petitioner at 29-31, Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

Cir. 1971). See also Branzburg v. Hayes, 408 U.S. 665, 682-83 (1972) (stating that newsmen are free to gather news by means within the law).

[165]See supra text accompanying notes 68-75.

[166]Dietemann v. Time, Inc., 449 F.2d at 249. Even when the individual was suspected of committing a crime, the court said that the use of hidden cameras in his home was an invasion of his privacy. Id.

[167]Cassidy v. American Broadcasting Companies, 377 N.E.2d at 131-32.

[168]Galella v. Onassis, 487 F.2d at 992.

[169]Id.

[170]Id. at 998. The zone of protection around the Onassis family was drastically reduced from what the lower court had established. For example, the distance that Gallela had to maintain between himself and Mrs. Onassis was reduced from fifty yards to twenty-five feet. The distance from the children was reduced from seventy-five yards to thirty feet. Id. at 1001 (Timbers, Cir. J., concurring in part and dissenting in part).

[171]Galella v. Onassis, 8 Media L. Rep. 1321, 1323 (S.D. N.Y. 1982).

[172]Id.

[173]Id. A recent newspaper article said that Galella promised a federal judge that he would never again aim a camera at Mrs. Onassis or her children. In return for his promise, Galella avoided a prison term that could have run as long as six years and a fine that could have been as high as $120,000. In addition to the promise, Galella had to pay Mrs. Onassis $10,000 and turn over all negatives and photographs that were made in violation of the 1975 court order. Southern Illinoisan, March 25, 1982, at 16, col. 1.

[174]Florida Publishing Co. v. Fletcher, 340 So. 2d 914, 918 (Fla. 1976), cert. denied, 431 U.S. 930 (1977).

[175]Rawls v. Conde Nast Publications, Inc., 446 F.2d 313, 317 (5th Cir. 1971), cert. denied, 404 U.S. 1038 (1972), reh'g denied, 405 U.S. 969 (1972).

[176]Bazemore v. Savannah Hospital, 155 S.E. 104, 197 (Ga. 1930); Barber v. Time, Inc., 159 S.W.2d at 195-96.

[177]Commonwealth v. Wiseman, 249 N.E.2d 610, 617-18 (mass. 1969), cert. denied, 398 U.S. 960 (1970), reh'g denied, 400 U.S. 954 (1970).

[178]Rawls v. Conde Nast Publications, Inc., 446 F.2d at 318.

[179]385 U.S. at 392.

[180]Id. at 387-88. The Court added that "it is for the jury, not for this Court, to determine whether there was knowing or reckless falsehood." Id. at 394 n. 11.

[181]Sarat Lahiri v. Daily Mirror, Inc., 295 N.Y.S. at 389. But see Binns v. Vitagraph Co. of American, 103 N.E. 1108, 1110-11 (N.Y.1913) (stating that the use of actors in a filmed recreation of a current event was a violation of the New York privacy statute.

[182]385 U.S. at 387-88.

[183]419 U.S. at 252.

[184]Faucheux v. Magazine Management, 5 Media L. Rep. at 1700; Goldman v. Time, Inc., 336 F. Supp. at 137-38; Samuel v. Curtis Publishing Co., 122 F. Supp. 327, 328-29 (N.D. Cal. 1954); Taylor v. KTVB, Inc., 525 P.2d at 987-88; Barber v. Time, Inc., 159 S.W.2d at 296.

[185]Time, Inc., v. Hill, 385 U.S. at 389.

[186]BLACK'S LAW DICTIONARY 419 (5th ed. 1979).

[187]FED. R. CIV. P. 26(b)(1).

[188]See, e.g., MINN. R. CIV. P. 26.02(3); TEX. R. CIV. P. 167; N.Y. CIV. PRAC. L. & R. 3101; N.J. CIV. P. 4:17-7.

[189]441 U.S. 153 (1979).

[190]Id. at 169-70. In twenty-six sessions held during a one-year period, the use of the discovery process produced 2,903 pages of testimony and 240 exhibits. For a discussion of the impact of Herbert v. Lando on

[140]Everett v. Carvel Corp. 334 N.Y.S.2d 922, 924 (N.Y. Sup. Ct. 1972).

[141]Abernathy v. Thornton, 83 So. 2d 235, 237 (Ala. 1955).

[142]Cox Broadcasting Corp. v. Cohn, 420 U.S. at 489.

[143]RESTATEMENT (SECOND) OF TORTS § 652D (1981).

[144]Williams v. KCMO Broadcasting Div.-Meredith Corp., 472 S.W.2d 1, 5 (Mo. Ct. App. 1971).

[145]Truxes v. Kenco Enterprises, Inc., 119 N.W.2d at 917.

[146]Daily Times Democrat v. Graham, 162 So. 2d 474, 477 (Ala. 1964). This case is the only reported case that found a photograph to be an embarrassing facts invasion of an individual's privacy. Given the visual fare offered through the media today, it is highly unlikely that such a picture would still be considered to be an embarrassing revelation.

[147]Fogel v. Forbes, 6 Media L. Rep. 1945-46 (E.D. Pa. 1980); Jacova v. Southern Radio and Television Co., 83 So. 2d 34, 40 (Fla. 1955); Cefalu v. Globe Newspaper Co., 391 N.E.2d 935, 939 (Mass. App. Ct. 1979).

[148]Ross v. Burns, 612 F.2d at 274.

[149]Faucheux v. Magazine Management, 5 Media L. Rep. at 1701; Gill v. Hearst Publishing Co., 253 P.2d at 444-45. But see Gill v. Curtis Publishing Co., 239 P.2d 630, 634 (Cal. 1952) (stating that a photograph of a couple kissing in public was an invasion of their privacy because the picture was unrelated to the accompanying article).

[150]Neff v. Time, Inc., 406 F. Supp. at 861.

[151]Gautier v. Pro-Football, Inc., 107 N.E.2d 485, 489 (N.Y. 1952). But see Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. at 574-75 (stating that the First Amendment does not give a television station the right to telecast a performer's entire act without consent.)

[152]Jaubert v. Crowley, 375 So. 2d 1386, 1391 (La. 1979).

[153]Mark v. KING Broadcasting Co., 618 P.2d 512, 519-20 (Wash. Ct. App. 1980).

[154]Petition of Post-Newsweek Stations, Florida, 370 So. 2d 764, 779 (Fla. 1979). See also Lyles v. Sate, 330 P.2d 734, 742 (Okla. Crim. App. 1958) (stating that courtroom photography does not invade the defendant's privacy).

[155]Brumfield v. State, 108 So. 2d 33, 38 (Fla. 1958). In this case, the court said in dicta that courtroom photography may invade a person's privacy. See also In re Mack, 126 A.2d 679, 682-83 (Pa. 1956), cert. denied, 352 U.S. 1002 (1956) (stating that courtroom photography could harm the defendant's right of privacy). It is doubtful that a strong invasion of privacy argument could be made against courtroom photography today in light of the United States Supreme Court statement that "interests in privacy fade when the information involved already appears on the public record." Cox Broadcasting Corp. v. Cohn, 420 U.S. at 494-95.

[156]Goldman v. Time, 336 F. Supp. at 138.

[157]Waters v. Fleetwood, 91 S.E.2d 344, 346 (Ga. 1956); Jones v. Herald Post Co., 18 S.W.2d 972, 973 (Ky. 1929).

[158]Metter v. Los Angeles Examiner, 95 P.2d at 495-96.

[159]Jacova v. Southern Radio and Television Co., 83 So. 2d at 40; Themo v. New England Newspaper Publishing Co., 27 N.E.2d 753, 755 (Mass. 1940); Williams v. KCMO Broadcasting Div.-Meredith Corp., 472 S.W.2d at 4.

[160]Taylor v. KTVB, Inc., 525 P.2d 984, 987-88 (Idaho 1974).

[161]Stafford v. Hayes, 327 So. 2d 871, 872 (Fla. Dist. Ct. App. 1976).

[162]Leverton v. Curtis Publishing Co. 192 F.2d 974, 976 (3d Cir. 1951); Kelley v. Post Publishing Co., 98 N.E.2d 286, 287 (Mass. 1951).

[163]Costlow v. Cusimano, 311 N.Y.S.2d 92, 94 (N.Y. App. Div. 1970).

[164]Galella v. Onassis, 487 F.2d 986, 995 (2d Cir. 1973); Dietemann v. Time, Inc., 449 F.2d 245, 249 (9th

[211]Old Colony Donuts, Inc. v. American Broadcasting Companies, Inc., 368 F. Supp. 785, 789 (D. Mass. 1974); Tropeano v. Atlantic Monthly, 400 N.E.2d 847, 851 (Mass. 1980); Cefalu v. Globe Newspaper Co., 391 N.E.2d at 939.

[212]See supra text accompanying notes 19-57.

[213]See supra text accompanying notes 58-67.

[214]See supra text accompanying notes 68-75.

[215]See supra text accompanying notes 79-108.

[216]See supra text accompanying notes 116-121.

[217]See supra text accompanying notes 122-26.

[218]See supra text accompanying notes 128-33. For an additional discussion on the problems involved in defining public interest, see Moore, A Newspaper's Risks in Reporting "Facts" From Presumably Reliable Sources: A Study in the Practical Application of the Right to Privacy, 22 S.C.L. REV. 1, 15 (1970); Note, Photography and the Right of Privacy, 10 WYO. L. REV. 74, 75-77 (1955).

[219]See supra text accompanying notes 134-36.

[220]See supra text accompanying notes 137-41.

[221]See supra text accompanying notes 142-46.

[222]See supra text accompanying notes 147-55.

[223]See supra text accompanying notes 156-63.

[224]See supra text accompanying notes 165-67.

[225]See supra text accompanying notes 68-75.

[226]Annot., 28 A.L.R.Fed. 904, 906 (1976); Lee, Privacy Intrusions While Gathering News: An Accommodation of Competing Interests, 64 IOWA L. REV. 1243, 1256-58 (1979); Note, Constitutional Law-Right of Privacy-Freedom of the Press Does Not Justify the Invasion of Privacy Through Subterfuge, 50 TEX. L. REV. 514, 518-19 (1972); Note, Tortious Invasion of Privacy: Minnesota as a Model, 4 WM. MITCHELL L. REV. 163, 206-14 (1978); Pember & Teeter, Privacy and the Press Since Time, Inc v. Hill, 50 WASH. L. REV. 57, 66-68 (1974); Prosser, Privacy, 48 CALIF. L. REV. 383, 390-92 (1960).

[227] See supra text accompanying notes 168-73.

[228] See supra text accompanying notes 174-81.

[229] See supra text accompanying notes 182-85.

[230] See supra text accompanying notes 186-96.

[231] Annot., 86 A.L.R.3d 374, 375-76 (1978); Annot., 30 A.L.R.3d 203, 210 (1969); Clemons, The Right of Privacy in Relation to the Publication of Photographs, 14 MARQ. L. REV. 193, 198 (1930); Fitzpatrick, The Unauthorized Publication of Photographs, 20 GEO. L.J. 134, 158-59 (1931-1932); Note, Right of Privacy-Nature and Extent of Liability for Unauthorized Publication of Pictures, 19 NEB. L. REV. 177, 179-85 (1949); Note, Right of Privacy-Unauthorized Use of Photographs, 24 MO. L. REV. 567, 570 (1959); Watkins, Private Property vs. Reporter Rights-A Problem in Newsgathering, 54 Journalism Q. 690, 694 (1977).

[232] See supra text accompanying notes 197-205.

[233] See supra text accompanying notes 206-11. For further discussion on the general question of commercial appropriation through photography, see Annot., 87 A.L.R.3d 1279 (1978); Annot., 23 A.L.R.3d 865 (1969); Smith, The Right of Privacy as Illustrated by the Case of Col. Jack Chinn v. Foster-Milburn Co., 4 KY. L.J. 22 (1915).

other libel cases, see Stonecipher, Discovery Proceedings in a Libel Context: The Impact of Herbert v. Lando (March 1982) (paper presented at the Southeastern Regional Colloquium, Law Division, Association for Education in Journalism, University of Florida, Gainesville, Florida, March 20-21, 1982; available from the author at the School of Journalism, Southern Illinois University, Carbondale, Illinois 62901).

[191]Cape Publications, Inc. v. Bridges, 387 So. 2d 436, 438-40 (Fla. Dist Ct. App. 1980). Although this case was eventually reversed, Cape Publications v. Bridges, 8 Media L. Rep. 2535 (Fla. Dist. Ct. App. 1982), the fact remains that the photographer and his newspaper had to submit material sought through the discovery process.

[192]Cape Publications, Inc. v. Bridges, 387 So. 2d at 438.

[193]Id. at 438-39.

[194]Uhl. v. Columbia Broadcasting Systems, Inc., 476 F. Supp. 1134, 1140 (W.D. Pa. 1979).

[195]Id. at 1139.

[196]Id. at 1141.

[197]Faucheux v. Magazine Management, 5 Media L. Rep. at 1699; Gill v. Hearst Publishing Co., 253 P.2d at 443; Gill v. Curtis Publishing Co., 239 P.2d at 634; Barber v. Time, Inc., 159 S.W.2d at 295.

[198]Michigan Conservation Clubs v. CBS, 5 Media L. Rep. 2566, 2574 (W.D. Pa. 1980); Fogel v. Forbes, 6 Media L. Rep. at 1944; Waters v. Fleetwood, 91 S.E.2d at 348; Buzinski v. DoAll Co., 175 N.E.2d at 580; Gautier v. Pro-Football, Inc., 197 N.E.2d, 488 (N.Y. 1952).

[199]Faucheux v. Magazine Management, 5 Media L. Rep. at 1700.

[200]Leverton v. Curtis Publishing Co., 192 F.2d at 977; Samuel v. Curtis Publishing Co., 122 F. Supp. at 329; Borgeau v. New York News, 5 Media L. Rep. 1799, 1800 (N.Y. Sup. Ct. 1979).

[201]Gill v. Curtis Publishing Co., 239 P.2d at 634; Metzger v. Dell Publishing Co., 136 N.Y.S.2d 888, 891 (N.Y. Sup. Ct. 1955).

[202]Jacova v. Southern Radio and Television Co., 83 So. 2d at 37; Gautier v. Pro-Football, Inc., 107 N.E.2d at 488.

[203]Jenkins v. Dell Publishing Co., 251 F.2d at 452.

[204]Humiston v. Universal Film Mfg. Co., 178 N.Y.S.2d 752, 757 (N.Y. App. Div. 1919).

[205]Waters v. Fleetwood, 91 S.E.2d at 348; Costlow v. Cusimano, 311 N.Y.S.2d at 95. But see Arrington v. New York Times Co., 449 N.Y.S.2d 941, 945-46 (N.Y. 1982) in which the court said that because a freelance photographer and a photo agency acted independently from the publisher of a photograph, a motion to dismiss an invasion of privacy complaint filed under the New York privacy statute should have been denied as it related to the photographer and the photo agency.

[206]Leverton v. Curtis Publishing Co., 192 F.2d at 977; Neff v. Time, Inc., 406 F. Supp. at 861; Goldman v. Time, Inc., 336 F. Supp. at 140. But cf. Zacchini v. Scripps-Howard, 433 U.S. 562 (in which a television news program's telecast of a performer's entire act was found to be an appropriation of the performer's property).

[207]For a list of those states which have privacy statutes forbidding the use of a person's name or likeness without consent, see supra text accompanying notes 58-67.

[208]Arrington v. New York Times Co., 449 N.Y.S.2d at 944-45; Murray v. New York Magazine Co., 27 N.Y.S.2d at 476; Guatier v. Pro-Football, Inc., 107 N.E.2d at 488; Everett v. Carvel Corporation, 334 N.Y.S.2d at 924; Costlow v. Cusimano, 311 N.Y.S.2d at 94; LaForge v. Fairchild Publications, Inc., 257 N.Y.S.2d 127, 128 (N.Y. App. Div. 1965); Delinger v. American News Co., 178 N.Y.S.2d 231, 232 (N.Y. App. Div. 1958); Goelet v. Confidential, Inc., 171 N.Y.S.2d 223, 225 (N.Y. App. Div. 1958); Middleton v. News Syndicate Co., 295 N.Y.S. 120, 121 (N.Y. App. Div. 1937); Blumenthal v. Picture Classics, Inc., 257 N.Y.S. 800, 804 (N.Y. App. Div. 1932); Humiston v. Universal Film Mfg. Co., 178 N.Y.S. at 758; Colyer v. Richard K. Fox Publishing Co., 146 N.Y.S. 999, 1001 (N.Y. App. Div. 1914); Moser v. Press Publishing Co., 109 N.Y.S. 963 (N.Y. App. Div. 1908); Salon v. Long Island Educational Television Council, 4 Media L. Rep. 1496, 1496 (N.Y. Sup. Ct. 1978); Sarat Lahiri v. Daily Mirror, Inc., 295 N.Y.S. at 386; Jeffries v. New York Evening Journal Publishing Co., 124 N.Y.S. 780, 781 (N.Y. Sup. Ct. 1910).

[209]MASS. GEN. LAWS ANN. ch. 214 § 3A (West Supp. 1981).

[210]N.Y. CIV. RIGHTS LAW §§ 50 to 51 (McKinney 1976).